91-1404

No. ——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

BASHIRAHMED M. AMEJI, M.D.,
Petitioner,

v.

FREDERIC J. COWAN, ATTORNEY GENERAL
COMMONWEALTH OF KENTUCKY,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

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March 2, 1992

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QUESTION PRESENTED

Whether the court of appeals erred in affirming dismissal of petitioner's due process challenges to his state court conviction where:

a) the court of appeals applied an established standard that, in conflict with the standards of other circuit courts of appeals, ignored the prejudicial weight of disputed evidence and examined only whether there remained substantial incriminating evidence against petitioner; and

b) the State's case against petitioner was based primarily upon highly prejudicial testimony of "other crimes" that were not, in fact, other crimes or probative of the elements of the crime charged.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Bashirahmed M. Ameji, respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The order of the court of appeals (entered September 13, 1991) is included in the Appendix at 1a-3a. The order of the court of appeals denying rehearing is included in the Appendix at 4a. The Order of the district

court dismissing petitioner's request for habeas corpus relief is included in the Appendix at 5a. The magistrate's report, adopted by the district court, is included in the Appendix at 6a-16a.

JURISDICTION

The judgment of the court of appeals was entered on September 13, 1991. Rehearing was denied on December 2, 1991. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part, that—

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury

U.S. Const. amend. VI.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, that—

> [N]or shall any State deprive any person of life, liberty, or property without due process of law

U.S. Const. amend. XIV.

STATEMENT OF THE CASE

The issue in this habeas appeal concerns the standard for determining whether the admission of disputed evidence, here "other crimes" testimony, rises to the level of an infringement of the accused's due process rights as protected by the Fourteenth Amendment. Petitioner does not contend that this standard, in light of the restraints of federalism, should be less than strict. But the level of scrutiny cannot be so minimal that serious evidentiary errors which raise substantial doubts as to the jury's impartiality are ignored so long as the state offered *some* valid and unimpeached incriminating

evidence. The established Sixth Circuit standard, however, does not require anything more than such minimal scrutiny.

This case squarely presents the issue of what standard is to be applied. The Sixth Circuit dismissed petitioner's substantial claims on the basis of a standard which looks solely to whether, "within the context of the entire record," the conviction is supported by "substantial evidence." Such a test neglects fair process altogether in favor of result, and lacks even the traditional protections imbued in a "harmless error" analysis, that is, evidence of overwhelming guilt or confidence that no reasonable juror could have reached a different result. The Sixth Circuit's approach conflicts with the standard applied in at least three other circuits. If petitioner's request for habeas relief had been reviewed in any of those circuits, the initial inquiry would have focused upon the disparity between the prejudicial effect of the disputed testimony and its probative weight. Where, as here, the disparity is so great as to create due process concerns, the question then becomes whether any violation was harmless. Under any version of the harmless error analysis, the remaining evidence against petitioner is too weak to sustain his conviction. This Court should grant certiorari to make uniform the standard to be applied and reverse the Sixth Circuit's ruling below.

A. Factual Background

1. Petitioner is a physician who practiced medicine in the Johnson County area of Eastern Kentucky. In early 1987, the Medicaid Fraud Control Division of the Office of the Attorney General for the State of Kentucky began an investigation of petitioner's reimbursement practices. Investigators sought statements from persons whom petitioner allegedly had not treated at all or who had been treated fewer times than the number reported in claims for reimbursement.

On April 8, 1987, a state grand jury returned a two-count indictment against petitioner, alleging a general scheme to defraud the medicaid program and 19 specific charges of fraud. Petitioner began an investigation of his own. He paid assistants, including Kimberly Music, to speak with patients whom the State's investigators had interviewed. The individuals assisting petitioner obtained at least five retractions from these parties. Eventually, the State dismissed the charge of scheming to defraud and 18 of the 19 specific charges. Petitioner pleaded guilty to the one remaining specific charge.[1]

2. Several months later, in December 1987, a different state grand jury indicted petitioner; this time it was charged that he and Music, alone or together, bribed and intimidated Eugena Keeton, who would have been a witness in the earlier fraud prosecution. Count I of the indictment alleged that petitioner and Music offered money and clothing to Keeton. Count II alleged that petitioner and Music threatened to take Keeton's children from her if she did not change her testimony.

Petitioner went to trial on these charges. The trial testimony is briefly summarized for purposes of comparing it to the disputed evidence that is at the core of petitioner's due process claim.

a. Keeton testified that sometime after she had signed a statement for State investigators saying that petitioner had not examined her two children, Music arranged to meet Keeton at a local restaurant. There, Music offered Keeton clothing and money if she would sign a statement saying petitioner had examined her children. After Keeton's repeated refusals, Music informed Keeton that she worked in a welfare office and threatened to have Keeton's children taken away. Keeton still refused.

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[1] Petitioner entered an "*Alford*" plea to this charge, under which he maintains his innocence. *See North Carolina* v. *Alford*, 400 U.S. 25 (1970).

Music then asked if Keeton would sign a statement saying that petitioner had *not* examined the children. When Keeton agreed, Music said she would find petitioner and that they should meet at a local convenience store to have the statement notarized. Music then found petitioner, who drove her to the store. There, Music met with Keeton and her husband who both signed a statement. Contrary to Music's representation, the statement said that the Keetons' children had been examined. Music then agreed to meet the Keetons at a local drugstore, apparently to purchase the promised clothing.

Keeton testified that petitioner was not at the restaurant, was not in the convenience store, and never offered her any money or threatened her in any way. Music did not meet the Keetons as she had promised. The Keetons went looking for Music, but never found her. Later that evening, Music telephoned the Keetons and offered $20 for their "trouble." [2]

Mrs. Blevins—Keeton's mother—was in the restaurant and testified that she overheard Music offer to buy some children's clothing for her daughter. Blevins testified that she was outside the convenience store talking with petitioner while Music was in the store with the Keetons. Blevins accompanied the Keetons to the drugstore and waited with them for Music, who never arrived.

The Keetons and Blevins then went to the local hospital to look for Music. They saw petitioner's car. Testimony from several parties indicated that when petitioner came out of the hospital and back to his car, he spoke to Blevins. The content of that conversation is disputed. The State's investigator testified that petitioner told Blev-

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[2] Music testified that petitioner knew nothing of her efforts to secure statements until the day she met with Keeton. Music's testimony was that Keeton told her she had remembered petitioner's examinations of her children and had volunteered to change her statement.

ins and the Keetons that he knew what they wanted and would take care of them if Music did not. In contrast, Blevins testified that she could not recall any such statement. She explained that this was "[b]ecause Kimberly [Music] told us all the time that [petitioner] did not know she was giving money to anyone." T.E., Vol. II, 234-35.

Jerry Sublett—Music's former boyfriend—testified that petitioner told him that he had hired someone to obtain statements from persons who might be witnesses in the State's fraud prosecution. Sublett further testified that he had received a check for $100 from petitioner, but Sublett did not recall the reason for the check. Sublett denied remembering an earlier conversation with investigators in which he allegedly told them that he had accepted the check, made out to him, on Music's behalf in return for her having obtained the Keetons' statement.

b. The State also introduced, over objection, the testimony of six persons involving so-called "other crimes." The State's expressed purpose was to show that petitioner and Music engaged in a common scheme or plan to bribe or intimidate potential witnesses in the earlier prosecution, and that petitioner knew of and intended Music's bribes and threats toward Keeton. The trial court admitted the testimony. The "other crimes" evidence was as follows:

(1) Iris Austin testified that Music came to her home on four occasions requesting that she sign a statement to the effect that three of her children were treated by petitioner on certain dates. On one visit, Music brought files from petitioner's office to remind Austin of the treatment dates. On another occasion, she brought a neighbor to try and convince Austin to cooperate. Austin testified that Music never offered her any money or threatened her and that petitioner never approached her at all.

(2) Jenny Dardy testified that petitioner gave her a list of dates showing when he had treated her in the

event she was contacted by the State's investigators. Dardy testified that petitioner never asked her about any affidavit or made any offer or threat.

(3) Charlotte Blevins, Keeton's sister, testified that petitioner's wife, who was also a physician, asked Charlotte to talk to petitioner's lawyers about the investigation and to speak to her sister about her statement to the attorney general. Charlotte denied that petitioner's wife offered any inducement to talk to Keeton. She also denied that petitioner's wife had urged her to try and convince her sister to change her statement.

(4) Linda Swanson testified that an employee of petitioner's named Lafferty asked her to sign an affidavit different from the one she had signed for the State's investigators. Swanson refused. Lafferty returned with office files to ask if the treatment dates stated therein were correct; Swanson said they were not. Music also visited Swanson. Swanson testified that no one offered her anything or made any threats to induce her to sign a second affidavit.

(5) Laura Frisk stated that she and her mother went to petitioner's office where they signed an affidavit confirming specific examination dates. Frisk stated that she signed the affidavit in return for a promise from petitioner that he would provide free medical care for her family until 1990. Frisk testified that petitioner did not talk to her about the investigation, nor did he ask her to change an earlier statement to investigators that petitioner never treated her.

(6) Jackie Sayler testified that after she gave a statement to State investigators she visited petitioner's office. She testified that he appeared upset and warned her that police were investigating her for selling drugs. Sayler testified that he did not ask, threaten, or bribe her to sign a new affidavit or to change her testimony.

Both petitioner and Music were convicted. Music received a one-year, probated sentence. The court sentenced petitioner to five years' imprisonment and fined him $500.

B. Proceedings Below

1. The Kentucky Court of Appeals upheld the conviction, reasoning that the disputed "other crimes" testimony was admissible to show that petitioner was aware of Music's actions concerning Keeton and that those actions were part of a common scheme or plan. The court acknowledged that "portions of the testimony summarized do not describe conduct which rises to the level of criminal conduct." *Ameji* v. *Commonwealth*, No. 88-CA-1173-MR, slip op. at 6 (Ky. Ct. App. May 19, 1989). Nonetheless, the court declared that "due to a lack of extensive evidence of [petitioner's] direct involvement with Keeton, there was a clear need for this evidence which outweighed its prejudicial effect. Thus the evidence was admissible." *Id.* at 7. The Kentucky Supreme Court denied discretionary review.

2. The district court referred review of petitioner's request for habeas corpus relief to a magistrate. The magistrate's report incorrectly cites a Kentucky case for the proposition that evidence of prior, *lawful* acts, even if highly prejudicial, may be introduced under the "other crimes" exceptions. App. 10a. An identical mistake appears in the State's submission to the magistrate.[3] Concluding that the testimony was admissible under state law, the magistrate declared the "other crimes" evidence relevant to the issues of knowledge and common scheme or plan and therefore found no constitutional violation.

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[3] This mistake was not only one of citation. The court of appeals and the magistrate were clearly wrong on this point of Kentucky law: Prejudicial evidence of *lawful* acts is *not* admissible under the exceptions to the "other crimes" evidentiary rule. *See, e.g., O'Bryan* v. *Commonwealth*, 634 S.W.2d 153, 157 (Ky. 1982) (evidence which did not show commission of a crime inadmissible); *Lantrip* v. *Commonwealth*, 713 S.W.2d 816, 816-17 (Ky. 1986) (evidence of past sexual advances not admissible). Even if these events are assumed to be "other crimes" evidence, they would be inadmissible to show common scheme or plan for the reason that they are not so similar to the crime charged or so unique in their pattern as to indicate a reasonable probability that petitioner knew of or intended Music's attempted bribes and threats toward Keeton. *See Adcock* v. *Commonwealth*, 702 S.W.2d 440, 443 (Ky. 1986).

The district court adopted the magistrate's report and dismissed the habeas petition.

The Sixth Circuit affirmed. The court of appeals described petitioner's due process challenge as a "claim that testimony was improperly admitted at trial [which] is simply a question of state law," and declared that such questions do "not rise to a level of constitutional magnitude." App. 2a.

REASONS FOR GRANTING THE PETITION

The order below reveals a longstanding conflict among the circuit courts of appeals with respect to their treatment of due process claims brought by habeas petitioners on the basis of disputed evidence introduced at trial. The Sixth Circuit's established standard for resolving these claims cannot be supported under this Court's due process rulings and is in direct conflict with at least three other circuit courts of appeals. Accordingly, this Court should grant certiorari to correct the confusion engendered by the Sixth Circuit's erroneous treatment of due process challenges to state court convictions.

a. This Term, in *Estelle* v. *McGuire*, 112 S. Ct. 475 (1991), this Court reiterated that " 'federal habeas corpus relief does not lie for errors of state law' " alone and that a mere inquiry into whether or not there was state error " 'is no part of a federal court's habeas review of a state conviction.' " *Id.* at 480 (quoting *Lewis* v. *Jeffers*, 110 S. Ct. 3092, 3102 (1990) and citing *Pulley* v. *Harris*, 465 U.S. 37, 41 (1984)). For the most part, the circuit courts have followed the rule that, while state law evidentiary errors are not to be questioned in a federal habeas corpus proceeding, some errors can so badly taint the trial process as to violate due process. *E.g.*, *Leverett* v. *Spears*, 877 F.2d 921, 925 (11th Cir. 1989); *United States* v. *DeRobertis*, 738 F.2d 168, 170 (7th Cir.), *cert. denied*, 469 U.S. 924 (1984).

The issue the Court should resolve here, however, is the one left open in *McGuire*; namely, the standard that

courts are to apply in determining whether the admission of disputed evidence violates the defendant's due process rights. *McGuire* did not resolve this issue because the Court concluded there that the evidence was probative of a crucial element of the State's case—intent. The line of cases supporting the Sixth Circuit's ruling on this issue here reveals a sharp contrast with other circuit courts of appeals.

In the Sixth Circuit's order below, the court declared that "petitioner's claim that testimony was improperly admitted at trial is simply a question of state law that does not rise to a level of constitutional magnitude." App. 2a (citing *Cooper* v. *Sowders*, 837 F.2d 284, 286 (6th Cir. 1988)). The *Cooper* v. *Sowders* opinion identifies the standard to be applied in assessing due process claims as one of "fundamental fairness." 837 F.2d at 286. The Sixth Circuit's "fundamental fairness" standard, however, looks not to the prejudicial effect of the testimony in dispute, but only to whether there exists "substantial evidence" to sustain the conviction on the record as a whole. The Sixth Circuit recently elucidated its test in *Waters* v. *Kassulke*, 916 F.2d 329 (6th Cir. 1990):

> We do not believe . . . that [the] error rendered the trial fundamentally unfair. In making this determination, such errors are to be considered "within the context of the entire record."
>
> > The "entire record" refers to all that occurred from the empanelment of the jury to the return of the verdict and includes, *inter alia*, the quality and quantity of the evidence of the defendant's guilt; the extent to which the substantive evidence of guilt produced by the prosecution was consistent or inconsistent, contradicted or uncontradicted, weak or forceful, and clear or vague; the manner in which the evidence was presented; the apparent independence, interest, or bias of the witnesses; the candor, clarity, and completeness of their testimony, including whether it was impeached; and everything the

> jury saw and heard, including the many objections, legal arguments, and evidentiary rulings that occurred in the jury's presence, as well as the court's instructions to the jury.

916 F.2d at 335 (quoting *Payne* v. *Janasz*, 711 F.2d 1305, 1310 (6th Cir.), *cert. denied*, 464 U.S. 1019 (1983) and *Lundy* v. *Campbell*, 888 F.2d 467, 473 (6th Cir. 1989), *cert denied*, 110 S. Ct. 2212 (1990) respectively). The court concluded that "[t]here was *substantial evidence*, absent [the disputed testimony] to establish the fact that" the defendant had committed the alleged crimes. *Id.* (emphasis added). Likewise in *Lundy* v. *Campbell*, 888 F.2d 467 (6th Cir. 1989), the court held that the inquiry was whether the errors were "so egregious as to have *nullified the legitimacy* of the properly admitted substantive evidence." *Id.* at 473 (emphasis added).

Other courts of appeals instead examine the particular evidence in dispute to determine whether its prejudicial effect outweighed its probative value. The Seventh, Eighth and Eleventh Circuits, for example, first determine "whether the probative value of the evidence outweighs the prejudice to the accused":

> When it must be said that the probative value of such evidence, though relevant, is greatly outweighed by the prejudice to the accused from its admission, the use of such evidence by a state may rise to the posture of the denial of fundamental fairness and due process of law.

DeRobertis, 738 F.2d at 171 (quoting *United States* v. *Pate*, 426 F.2d 1083, 1086 (7th Cir. 1970), *cert. denied sub nom. Durso* v. *Pate*, 400 U.S. 995 (1971)); *Warden* v. *Wyrick*, 770 F.2d 112, 116, *cert. denied*, 474 U.S. 1035 (1985) ("to successfully raise a habeas claim that other crimes testimony was unfairly prejudicial and infringed the constitutional right to a fair trial, the habeas petitioner must show gross or conspicuous prejudice"); *Thigpen* v. *Thigpen*, 926 F.2d 1003, 1012 (11th Cir. 1991) ("[a]n erroneous evidentiary ruling creates such fundamental unfairness when the wrongfully admitted evidence

is 'material in the sense of a crucial, critical, highly significant factor'") (quoting *Leverett* v. *Spears*, 877 F.2d 921, 925 (11th Cir. 1989)).

The difference is significant. The Sixth Circuit's standard simply looks to the quality and quantity of the incriminating evidence presented at trial to determine whether sufficient evidence of guilt exists to deny the petition. It does not require the crucial step of examining whether the disparity between the prejudicial effect of the disputed testimony and its probative weight is so great as to deprive the accused of an unbiased jury *despite* the other evidence presented.[4]

The omission of this step is particularly unfair where, as here, the disputed evidence is "other crimes" testimony. Under the Federal Rule of Evidence 404(b), evidence of other crimes, wrongs, or acts is generally not admissible.[5]

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[4] The Sixth Circuit's test cannot reasonably be construed as a kind of "harmless error analysis" for it lacks the heightened standards this Court has required for such an analysis in order to ensure that the verdict may be allowed to stand on appellate review. *See, e.g., United States* v. *Lane*, 474 U.S. 438, 450 (1986) (harmless error analysis requires a showing of "overwhelming evidence of guilt"). In *Lane*, the Court noted "[w]e can agree with [the] dissent 'that the harmless error inquiry is entirely distinct from a sufficiency-of-the-evidence inquiry.' [T]he threshold of overwhelming evidence [of guilt] is far higher than a mere sufficiency to uphold conviction." *Id.* at 450 n.13 (quoting dissent of Stevens, J. at 746). *See also Chapman* v. *California*, 386 U.S. 18, 23 (1967) ("The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction") (quoting *Fahy* v. *Connecticut*, 375 U.S. 85, 86-87 (1963)). The Sixth Circuit's standard, however, lacks any of these assurances that the disputed evidence was in fact harmless. Indeed, the Sixth Circuit's standard amounts to little more than a sufficiency-of-the-evidence test, as this case amply illustrates.

[5] The exceptions to this rule are essentially the same as those acknowledged by the Kentucky courts in this case, *viz.*, where the evidence is probative of motive, opportunity, intent, preparation, plan, knowledge, or absence of mistake. *See* Fed. R. Evid. 404(b). Contrary to the State's contentions below, those exceptions are not applicable here for the reasons stated *infra* at pp. 13-14.

The exclusion of such evidence "gives meaning to the central precept of our system of criminal justice, the presumption of innocence." *United States* v. *Daniels*, 770 F.2d 1111, 1118 (D.C. Cir. 1985). Many courts have acknowledged such evidence to be highly prejudicial. See, *e.g.*, *United States* v. *Nichols*, 781 F.2d 483, 485 (5th Cir. 1986) (other crimes evidence has a "highly prejudicial nature"); *O'Bryan* v. *Commonwealth*, 634 S.W.2d 153, 156 (Ky. 1982) (such evidence "tends instead to influence the jury, and the resulting prejudice often outweighs its probative value"); *Ex parte Arthur*, 472 So.2d 665, 668 (Ala. 1985) (evidence "has almost an irreversible impact upon the minds of jurors") (quoting C. Gamble, *McElroy's Alabama Evidence* § 69.01(1) (3d ed. 1977)). Here, that prejudice denied petitioner a fundamentally fair trial.

b. The state introduced the so-called "other crimes" testimony, summarized above, to show petitioner's "criminal intent, knowledge, and that a plan or scheme existed to bribe and harass witnesses."[6] The probative value of the testimony as to these issues, however, was nil. None of the "other crimes" witnesses in fact testified to other crimes or even bad acts. Their testimony is fully consistent with *lawful* attempts by petitioner, through Kimberly Music and others, to marshall his defense in the face of a fraud indictment.[7] The testimony thus demonstrates absolutely no intent or knowledge with respect to bribing or intimidating these witnesses, and is irrelevant to the central issue of whether petitioner had knowledge of Music's purported intent to bribe and/or threaten Keeton. Nor is the testimony appropriate to prove a common

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[6] State's 6th Cir. Br. at 26.

[7] The commentary of the Kentucky Crime Commission to the Kentucky statute prohibiting witness intimidation cautions that the "provision is obviously not intended to apply to situations such as attorneys and insurance investigators taking statements." Ky. Rev. Stat. Ann. § 524.040 (commentary of Ky. Crime Comm'n).

scheme or plan, for that was not at issue; the defense *admitted* that petitioner acted in concert with Music and others in investigating each of the 19 specific charges of fraud alleged in the indictment. See *United States* v. *Zelinka*, 862 F.2d 92, 98 (6th Cir. 1988) ("other crimes" evidence "must relate to a matter which is 'in issue' ") (quoting *United States* v. *Blankenship*, 775 F.2d 735, 739 (6th Cir. 1985)); *United States* v. *O'Connor*, 580 F.2d 38, 41 (2d Cir. 1978) (where issue was not in dispute, other crimes evidence was inadmissible to prove that issue); E. Cleary, *McCormick on Evidence* § 190 (3d ed. 1984 & Supp. 1987) (bad acts evidence inadmissible to prove an issue not in dispute). At bottom, the "other crimes" testimony was probative only to show what was already admitted and therefore not at issue.

The testimony was, however, extremely prejudicial for at least three reasons. First, it drew the jury's attention away from the specific events that were the only criminal acts charged—Music's contacts with Keeton and petitioner's alleged knowledge of the nature of those contacts. Second, the evidence creates an impression that petitioner was "directing" Music's activities; on that basis jurors may have inferred that he was also directing Music to bribe and threaten, although the record contains absolutely no direct evidence of such direction and the circumstantial evidence is to the contrary. Third, and perhaps most important, the evidence indicates that petitioner might have a "propensity" to be party to Music's offense, for its shows that he had contacted other potential witnesses through intermediaries. Accordingly, the disparity between the probative value of the "other crimes" testimony and its prejudicial effect was great.

Finally, the fundamental unfairness of the admission of this testimony is further illustrated by the State's own concessions that, absent the "other crimes" testimony, its case against petitioner was particularly weak. In its brief before the Sixth Circuit, the State observed: "[b]ecause the crime in question was a 'white collar

crime' where the petitioner sought to remove himself as much as possible from the conduct of Music, evidence to show a plan or scheme was of *vital importance.*" State's 6th Cir. Br. at 26 (emphasis added). And, as noted above, *supra* p. 8, the Kentucky Court of Appeals, in affirming petitioner's conviction, declared that the "clear need for this evidence" to obtain the conviction was sufficient to outweigh any prejudicial effect.[8] *Ameji* v. *Commonwealth*, No. 88-CA-1173-MR, slip op. at 7 (Ky. Ct. App. May 19, 1989); see also *O'Bryan*, 634 S.W.2d at 156 (other crimes testimony may be admitted when, *inter alia*, prejudice is "outweighed by the probative worth *and need for the evidence*") (emphasis added).

* * *

In sum, under an appropriate examination of the prejudicial effect of the disputed "other crimes" testimony and a proper harmless error analysis, petitioner's conviction cannot be upheld. This Court's review is warranted in order to correct the Sixth Circuit's long-established and mistaken test for assessing due process challenges to state convictions based upon disputed evidentiary rulings. The undoubted frequency with which federal courts consider these due process challenges in habeas proceedings makes the need for a resolution of this conflict among the circuits particularly compelling.

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[8] This holding of the Kentucky Court of Appeals itself raises federal due process concerns which fall under petitioner's challenge to his conviction on the basis of the trial court's admission of the disputed "other crimes" testimony. Under the standard quoted above, the probative value of the evidence is determined not by an inquiry into its relevance or tendency to prove one of the elements of the crime charged, but instead is determined by an assessment of the State's "need" for incriminating testimony. This peculiar definition of "probative weight" renders the traditional balancing of probative weight against prejudicial effect a nullity and thus makes all disputed testimony not prohibited by statute admissible at the whim of the State. Such a trial process is itself fundamentally unfair and hence a violation of due process guarantees.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 2, 1992

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 91-5429

BASHIRAHMED M. AMEJI, M.D.,
Petitioner-Appellant,

v.

FREDERIC J. COWAN, Attorney General,
Commonwealth of Kentucky,
Respondent-Appellee.

[Filed Sep. 13, 1991]

ORDER

BEFORE: KEITH and MARTIN, Circuit Judges, and TAYLOR, District Judge.*

Bashirahmed M. Ameji appeals the dismissal of his petition for a writ of habeas corpus filed under 28 U.S.C. § 2254. This case has been referred to a panel of the court pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Following a jury trial in the Johnson County, Kentucky, Circuit Court in April 1988, Ameji was convicted of bribing a witness and intimidating a witness, and was sentenced to five years imprisonment. Ameji's convictions were affirmed by the Kentucky Court of Appeals on direct

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* The Honorable Anna Diggs Taylor, U.S. District Judge for the Eastern District of Michigan, sitting by designation.

appeal and the Kentucky Supreme Court denied a motion for discretionary review.

Ameji then filed his habeas petition in the district court alleging that: (1) insufficient evidence supports his convictions; and (2) improper testimony was admitted into evidence at trial. The magistrate judge recommended that the petition be dismissed. The district court adopted the magistrate judge's recommendation and dismissed the petition over Ameji's objections.

Upon consideration, we affirm the judgment of the district court because petitioner was not deprived of a fundamentally fair trial. *See Lundy v. Campbell*, 888 F.2d 467, 469-70 (6th Cir. 1989), *cert. denied*, 110 S. Ct. 2212 (1990). First, federal courts must accept the statement of facts as provided by the Kentucky Court of Appeals as correct pursuant to 28 U.S.C. § 2254(d) because petitioner does not contend that the statement is erroneous. *See Sumner v. Mata*, 455 U.S. 591, 591-93 (1982) (per curiam); *Smith v. Jago*, 888 F.2d 399, 407-08 (6th Cir. 1989), *cert. denied*, 110 S. Ct. 2572 (1990). Viewing the evidence in the light most favorable to the prosecution, *see Brown v. Davis*, 752 F.2d 1142, 1147 (6th Cir. 1985), we conclude that petitioner's convictions are supported by ample evidence, albeit largely circumstantial evidence, under the test enunciated in *Jackson v. Virginia*, 443 U.S. 307, 313-24 (1979). *See United States v. Vannerson*, 786 F.2d 221, 225 (6th Cir.), *cert. denied*, 476 U.S. 1123 (1986). Further, petitioner's claim that testimony was improperly admitted at trial is simply a question of state law that does not rise to a level of constitutional magnitude. *See Cooper v. Sowders*, 837 F.2d 284, 286 (6th Cir. 1988).

Accordingly, the judgment of the district court is affirmed pursuant to Rule 9(b)(3), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Clerk

A TRUE COPY

Attest:

LEONARD GREEN
Clerk

By /s/ Diane Schneer
Deputy Clerk

Issued as Mandate: 12/11/91

Costs: No Costs

Filing Fee ..... $
Printing ..... $
Total ..... $

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 91-5429

BASHIRAHMED M. AMEJI, M.D.,
Petitioner-Appellant,

v.

FREDERIC J. COWAN, Attorney General,
Commonwealth of Kentucky,
Respondent-Appellee.

[Filed Dec. 2, 1991]

ORDER

BEFORE: KEITH and MARTIN, Circuit Judges, and TAYLOR, District Judge.*

Bashirahmed M. Ameji petitions for a rehearing of this court's September 13, 1991, order affirming the district court's dismissal of his petition for a writ of habeas corpus filed under 28 U.S.C. § 2254.

Upon careful consideration of the petition for rehearing, the panel concludes that it has not overlooked or misapprehended any point of law or fact in its order of September 13, 1991. Fed. R. App. P. 40(a).

Accordingly, the petition for rehearing is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Clerk

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* The Honorable Anna Diggs Taylor, U.S. District Judge for the Eastern District of Michigan, sitting by designation.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

Civil Action No. 89-256

BASHIRAHMED M. AMEJI, M.D.,
Petitioner,

VS:

FREDERICK J. COWAN, ATTORNEY GENERAL, ETC.,
Respondent.

[Filed Mar. 26, 1991]

ORDER

United States Magistrate Judge Peggy E. Patterson having recommended that relief in the above-styled habeas corpus cause of action be denied [Record No. 19], and having considered *de novo* the the petitioner's objections thereto [Record No. 20], and being advised,

IT IS ORDERED herein as follows:

(1) that the petitioner's objections to Magistrate Judge Patterson's Report and Recommendation be, and the same hereby are, OVERRULED.

(2) that said Report and Recommendation be, and the same hereby is, ADOPTED as the court's findings and conclusions.

(3) that the above-styled cause be, and the same hereby is, DISMISSED and STRICKEN FROM THE DOCKET.

This the 26th day of March, 1991.

/s/ Joseph M. Hood
JOSEPH M. HOOD, Judge

Date of Entry and Service: Mar. 26, 1991

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

Civil Action No. 89-256

BASHIRAHMED M. AMEJI, M.D.,
Petitioner,

vs.

ATTORNEY GENERAL OF THE COMMONWEALTH OF KENTUCKY,
Respondent.

[Filed Jan. 15, 1991]

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

Bashirahmed M. Ameji, M.D., petitioner, filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Respondent, Frederick J. Cowan, Attorney General, Commonwealth of Kentucky, filed a response to which petitioner filed a reply. Currently ripe for decision, this matter has been referred to the undersigned for initial consideration and a report and recommendation. 28 U.S.C. § 636(b)(1)(B).

On April 8, 1987, a Franklin Circuit Court Grand Jury indicted petitioner on the following two counts: Count One alleged petitioner devised and engaged in a scheme to fraudulently obtain benefits from the Kentucky Medical Assistance Program; Count Two alleged that petitioner submitted fraudulent claims for benefits pursuant to the Assistance Program. Following a plea bargain where the Commonwealth dismissed Count One of the indictment, petitioner entered a plea of gulity to submis-

sion of a fraudulent claim to obtain benefits from the Kentucky Medical Assistance Program, a Class A misdemeanor. On December 18, 1987, approximately eight months after the Franklin County indictment, a Johnson County Grand Jury indicted petitioner and a co-defendant, Kimberly Music, with acting in complicity to bribe and intimidate Eugena Keeton, a witness scheduled to testify in the Franklin County proceeding. On May 23, 1988, following a jury trial finding petitioner guilty on both counts of the indictment, the Johnson Circuit Court sentenced petitioner to five (5) years' imprisonment for bribing a witness and imposed a $500.00 fine for harassing a witness. By an unpublished opinion dated May 19, 1989, the Kentucky Court of Appeals affirmed petitioner's conviction for both offenses. By order dated August 11, 1989, the Kentucky Court of Appeals denied petitioner's petition for rehearing. By order dated November 22, 1989, the Supreme Court of Kentucky denied petitioner's motion for discretionary review.

Petitioner raises two arguments in support of his petition to this Court for habeas corpus review of his Johnson County convictions: first, the admission of "other crimes or similar acts" evidence violated petitioner's due process right to a fundamentally fair trial; second, the evidence submitted against him was insufficient to meet the standard of *Jackson v. Virginia*, 443 U.S. 307 (1979).

The standard by which this Court must review petitioner's claims is well established. The admission or exclusion of evidence in a state trial will not be questioned in a federal habeas corpus proceeding unless such admission or exclusion renders the trial so fundamentally unfair as to constitute a denial of due process. *Logan v. Marshall*, 680 F.2d 1121, 1123 (6th Cir. 1982).

First, petitioner asserts that the admission of evidence regarding other crimes or similar acts was highly prejudicial and violated his due process right to a fundamentally fair trial. Evidence of prior crimes or similar

acts is admissible in Kentucky when the act has a special relationship to the offense charged; the evidence must show motive, identity, absence of mistake or accident, intent, knowledge, or common scheme or plan. *Pendleton v. Commonwealth*, Ky., 685 S.W.2d 549, 552 (1985). Evidence of prior crimes or similar acts is admissible if the evidence is relevant to the issues, establishes more than a general criminal disposition and the possibility of prejudice to the accused is outweighed by the probative worth of the evidence. *O'Bryan v. Commonwealth*, Ky., 634 S.W.2d 153, 156 (1982). Therefore, evidence of other crimes or similar acts is admissible to show a scheme or plan where the acts are connected with and not too remote from the charged offense. *Id.* at 156.

Petitioner maintains that none of the witnesses who testified about similar acts was bribed or harassed by his co-defendant Music, at petitioner's direction; therefore, admission of such evidence is unduly prejudicial and rendered petitioner's trial fundamentally unfair. It is clear, after a thorough review of the trial transcript, that the testimony of the six witnesses was relevant to the issue of whether petitioner knew of Music's actions concerning Eugena Keeton, whose allegations formed the basis of the Johnson County Indictment, and whether Music's acts were part of a common scheme or plan devised by petitioner and Music to avoid petitioner's prosecution in Franklin County. Iris Austin testified that Music came to her home on four occasions requesting that she sign a statement to the effect that three of her children were treated by petitioner on certain dates. When Austin erased her signature from the statement, Music had medical charts which reflected that Austin's children had been seen by petitioner. Austin testified that petitioner never treated her children. On another occasion Music returned with Austin's neighbor to try and convince Austin to sign. [TE 85-94.] Jenny Dardy testified that petitioner gave her a list of dates to refer to in the event she was questioned by the Attorney General's office.

[TE 99-103]. Laura Frisk testified that she signed an affidavit in petitioner's office stating that she had been treated on eight specific dates by petitioner in exchange for his promise of free medical care for her entire family until 1990. Frisk also testified that petitioner promised to help her mother receive social socurity. This affidavit is in direct contrast to an earlier statement where Frisk stated that she had never been examined by petitioner. [TE 104-124]. Jackie Salyer testified that, after signing an affidavit for the Attorney General's office stating that her children were never examined by petitioner, petitioner became very upset during an office visit and warned her that police were investigating her for selling drugs. [TE 125-130]. Charlotte Blevins, Eugena Keeton's sister, testified that petitioner's wife, a pediatrician sharing an office next to petitioner, asked Blevins to talk to Keeton about her statement to the Attorney General. Petitioner's wife also assured Blevins that she did not have to pay for medical treatment. [TE 168-179]. Finally, Linda Swanson testified that an employee of petitioner approached her to sign an affidavit which differed from the one she had signed at the Attorney General's office. After Swanson refused, petitioner's employee presented files from his office and asked Swanson if the treatment dates were correct. When she said they were not, the employee approached Swanson about applying for a job at petitioner's office. Co-defendant Music also visited Swanson and asked why she would not sign the affidavits. Music also indicated to Swanson that she was working for petitioner as a favor. [Swanson's Dep.].

Petitioner argues that the trial court, as well as the Kentucky Court of Appeals, failed to distinguish between lawful attempts to obtain retractions and unlawful attempts to obtain retractions by bribery and intimidation. Petitioner maintains that the evidence presented by the six witnesses does not demonstrate that petitioner or co-defendant Music attempted to bribe or intimidate any witness. Petitioner supports this argument with a

recent Ninth Circuit decision, *McGuire v. Estelle*, 873 F.2d 1323 (9th Cir. 1989), where defendant was convicted in a California state court for murdering his sixth-month old baby. Defendant filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 asserting that the admission of evidence of possible sexual abuse violated his right to a fundamentally fair trial. The court found such evidence highly prejudicial as "the jury, however, was presented with no direct proof of whether McGuire or his wife caused these prior injuries. . ." *Id.* at 1326. These facts, however, are distinguishable from the present case. Contrary to petitioner's assertion, there is direct proof that petitioner conspired with co-defendant Music to bribe and intimidate Eugena Keeton. The testimony of Eugena Keeton, Terry Sublett, co-defendant's boyfriend, and Robert Fockle, senior investigator for the Attorney General's office, directly support the indictment.

In addition, under Kentucky law, there is no distinction between lawful and unlawful similar acts for evidentiary purposes. The testimony of the six witnesses allowed by the trial court was relevant and properly admitted. As the Kentucky Supreme Court recognized in *Jones v. Commonwealth*, Ky., 564 S.W.2d 366 (1977):

> All evidence which is pertinent to the issue and tends to prove the crime charged against the accused is admissible, although it may also prove or tend to prove the commission of other crimes by him or to establish collateral facts. The fact that it may tend to prejudice the accused in the minds of the jurors is not a ground for its exclusion. *Id.* at 363.

It is clear that the testimony of the six witnesses was not designed to show that petitioner was a person of bad character or had a general propensity for criminality. To the contrary, the testimony was admitted to show petitioner's criminal intent, knowledge, and the existence of a plan or scheme to bribe and harass a witness. As the Kentucky Court of Appeals held:

> Moreover, due to a lack of extensive evidence of [petitioner's] direct involvement with Keeton, there was a clear need for this evidence which outweighed its prejudicial effect. Thus, the evidence was admissible.

Ameji v. Commonwealth of Ky., 88-CA-1173-MR (Slip Opinion p. 9). Therefore, the admission of such evidence by the trial court was proper and petitioner's due process rights to a fundamentally fair trial were not violated.

Secondly, petitioner asserts that the evidence admitted against him was insufficient to meet the standard of *Jackson v. Virginia*, 443 U.S. 307 (1978). The *Jackson* court set forth a constitutional test to determine whether a defendant is entitled to a directed verdict of acquittal:

> The relevant question is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review all of the evidence is to be considered in the light most favorable to the prosecution. *Id.* at 319.

The *Jackson* standard applies to federal habeas corpus proceedings. *York v. Tate*, 858 F.2d 322 (6th Cir. 1988). The standard also applies where much of the evidence supporting the conviction is circumstantial. *United States v. Tager*, 788 F.2d 349 (6th Cir. 1986). In the present case, the Kentucky Court of Appeals applied this standard to determine that the evidence was sufficient. *Commonwealth v. Sawhill*, Ky., 660 S.W.2d 3 (1983) (adopting the constitutional test as set forth in *Jackson*).

Petitioner maintains that the evidence falls short of proving that he acted in complicity with his co-defendant to bribe or intimidate a witness. Specifically, petitioner argues that the Commonwealth proved only that he and Music have lawfully attempted to obtain retractions in the past, and that he was merely present, but in no way involved in his co-defendant's misconduct. Petitioner was indicted for complicity (KRS 502.020) to bribe and harass a witness (KRS 524.020, 542.040).

Under the indictment, the Commonwealth was required to prove a violation of KRS 524.010(1)(a) which provides the following:

> (1) A person is guilty of bribing a witness when he offers, confers or agrees to confer any pecuniary benefit upon a witness or a person he believes may be called as a witness in any official proceeding with intent to:
>
> (a) Influence the testimony of that person. . . .

With respect to the intimidation charge, the Commonwealth was required to prove a violation of KRS 524.040 (1)(a) which states the following:

> (1) A person is guilty of intimidating a witness when, by use of a threat directed to a witness or a person he believes may be called as a witness in any official proceeding, he:
>
> (a) Influences, or attempts to influence the testimony of that person. . . .

Because the indictment charges petitioner with complicity, the Commonwealth was required to show that petitioner's conduct was of the type described in KRS 502.020(1)(a)-(b) which provides the following:

> (1) A person is guilty of an offense committed by another person when, with the intention of promoting or facilitating the commission of the offense, he:

(a) Solicits, commands, or engages in a conspiracy with such other person to commit the offense; or

(b) Aids, counsels or attempts to aid such person in planning or committing the offense. . . .

The Kentucky Supreme Court has specifically defined "accomplice" as:

> One that who knowingly and voluntarily, and with common intent, unites with the principal in the preparation of the crime, other by being present and joining in the criminal act by aiding and abetting in its commission, or, if not present by advising and encouraging the performance of the act. *Lefevers v. Commonwealth*, Ky., 558 S.W.2d 585, 589 (1977).

Even assuming for the sake of argument only that the evidence of other crimes or similar acts was inadmissible, the remaining evidence is sufficient to sustain petitioner's convictions for bribing and harassing Eugena Keeton. A review of the trial evidence establishes that the Commonwealth introduced sufficient evidence to support the verdict. The undersigned adopts the Kentucky Court of Appeals' summary:

> The offenses allegedly were committed during a meeting between Music and Keeton. Music left a note at Keeton's home asking to meet with her. Keeton testified that when she met with Music at Druther's Restaurant, Music 'told me she would pay me good' and would give me 'clothing for my children' in exchange for a statement by Keeton indicating that appellant had treated her children. Music also told Keeton 'that she worked at the welfare office and she could have my kids taken if I didn't cooperate with her.' Keeton refused to sign the statement.
>
> Apparently exasperated, Music then asked if Keeton would sign a statement to the effect that

appellant *had not* treated her children. Keeton agreed. Music left the restaurant saying she was going to get appellant. She returned several minutes later in a car driven by appellant. Keeton then drove with her husband and mother, who had also been at Druther's, to Larry's Shop a Minute where she met Music and had a handwritten statement notarized. The statement Keeton signed, however, stated that appellant had treated her children on two occasions. Keeton testified that she signed this statement without reading it and that this was not the statement she had agreed to sign.

Appellant remained outside while Music and Keeton were inside the grocery store. Later on that day, after Keeton failed to meet up with Music as they agreed upon, Keeton and her husband and her mother stopped by the hospital because they saw appellant's car and thought they would find Music. Appellant came out to the car while Keeton went in the hospital to find Music. According to the testimony of an investigator from the attorney general's office, which was offered without objection, Keeton's mother agreed that appellant said something to the effect that if Music did not satisfy them, he would. Keeton also testified that later Music offered her $20 for her trouble.

In addition, evidence was adduced from Terry Sublett, a boyfriend of Music, that appellant stated that he had a woman working for him to get patients to change their stories. An investigator testified, without objection, that Sublett called the attorney general's office and said appellant stated that he was paying this woman $75 for each such statement. Music allegedly told appellant that she would contact patients in the same manner. Moreover, appellant wrote a check to Sublett for $100 which he told Sublett to give to Music. Sublett told the investigator

> that this was in payment for the statement Music obtained from Keeton. Also, Music admitted that she asked appellant to help her draw up a statement for Keeton to sign.

This evidence, when viewed most favorably to the prosecution, establishes that any rational trier of fact could have found, beyond a reasonable doubt, that petitioner actively counseled and assisted co-defendant Music in bribing and intimidating Eugena Keeton. *Jackson, supra* at 319.

Petitioner asserts that the key Kentucky decision which establishes the insufficiency of the Commonwealth's evidence is *Lester v. Commonwealth*, 144 S.W.2d 808 (1940). In this case, Lester and his co-defendant wife were criminally charged with conspirng to procure certan witnesses to commit perjury in a civil action. The proof offered against co-defendant established that: first, she was associated with her husband by marriage; second, she had accompanied him on some visits to potential witnesses but had remained outside their presence; and third, that she had written some of the statements eventually signed. The court found that the evidence was insufficient to establish a conspiracy when it applied the following standard:

> The circumstances relied on to establish a conviction must be so unequivocal and incriminating in their nature as to exclude every reasonable hypothesis of the innocence of the accused. *Lester*, at 18.

This "reasonable hypothesis" approach no longer meets federal constitutional standards, rendering *Lester* unpersuasive. *United States v. Adamo*, 742 F.2d 927, 932 (6th Cir. 1984). Applying the *Jackson* standard, Eugena Keeton's testimony, standing alone, is direct proof that co-defendant Music was acting under the guidance of petitioner. In fact, when Keeton said she would sign a paper stating petitioner had never treated her children,

Music responded "Well, I'll have to go hunt him [petitioner] I don't know where he's at. . ." [TE 193] indicating that co-defendant Music was working under petitioner's guidance.

It is clear from the trial transcript that the Kentucky Court of Appeals employed the proper standard to review the evidence, that the trial court did not abuse its discretion by allowing testimony regarding other crimes or similar acts, and even without this evidence, it was proper for the jury to have found petitioner guilty of the offenses charged. Therefore, the trial court did not err by denying petitioner's motion for a directed verdict of acquittal.

In summary, petitioner has failed to demonstrate that he is entitled to a writ of habeas corpus in this Court. Accordingly, it is recommended that respondent's motion to dismiss be granted and this action be stricken from the docket with prejudice.

Particularized objections to this Report and Recommendation must be filed within ten (10) days of the date of service of the same or further appeal is waived. *Thomas v. Arn*, 728 F.2d 813 (6th Cir. 1984), *aff'd*, 474 U.S. 140 (1985); *Wright v. Holbrook*, 794 F.2d 1152, 1154-55 (6th Cir. 1986). A party may file a response to another party's objections within ten (10) days after being served with a copy thereof. Rule 72(b), Fed. R. Civ. P.

This the 15th day of January, 1991.

/s/ Peggy E. Patterson
PEGGY E. PATTERSON
United States Magistrate Judge

Date of Entry and Service: Jan. 16, 1991